SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JAMES VARGA, Plaintiff, vs. TWITCH INTERACTIVE, INC. a/k/a TWITCH.TV, INC. Defendants. AND RELATED CROSS ACTION	Case No. CGC – 18-564337 **PROPOSED STATEMENT OF DECISION (LIMITATIONS OF LIABILITY CLAUSE)**

The parties have bifurcated an issue for a bench trial, held August 13-15, 2019. Closing briefs dated September 20 were delivered to me September 23, 2019. This is my proposed statement of decision and tentative ruling. CRC 3.1590(c)(1). Parties objecting under CRC 3.1590(g) should be familiar with the authorities that describe the limited purposes of objections.[1] I will set a case management order in my final statement of decision.

The parties are plaintiff and cross-defendant James Varga and defendant and cross-complainant Twitch Interactive. Twitch operates an online platform that allows the public to view live-streamed videogames. Varga is professional video game player and for several years streamed his gameplay on Twitch. The issue presented now is whether a limitations of liability

[1] E.g., *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal.App.4th 1372, 1380 (1993); *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 154 Cal.App.4th 547, 560 (2007); *Heaps v. Heaps*, 124 Cal.App.4th 286, 292 (2004) ("The main purpose of an objection to a proposed statement of decision is not to reargue the merits, but to bring to the court's attention inconsistencies between the court's ruling and the document that is supposed to embody and explain that ruling"). I solicit objections and suggested clarifications from *both* sides, including suggestions on further rulings I should make, and identifying evidence.

clause in the agreement[2] between Varga and Twitch is unenforceable. Varga presents three bases for his position that the provision, which could limit his recovery to $50,000, is unenforceable: the provision (1) is unconscionable; (2) violates public policy; and (3) is an unreasonable liquidated damages clause.

Background

By November 2012 when Varga signed his agreement with Twitch, Varga was one of the top live-streamers, by his account one of the top 25. (57[3]) He was operating on the Own3D platform, using the alias PhantomL0rd, and worked around 90-120 hours a week. (43) His compensation, as is typical for live streamers, was a combination of advertising revenue share, sponsorships, and donations. By November 2012, Own3D owed Varga almost $8000, but it is not apparent that (at least before his phone call recited next) Varga thought Own3D was in serious financial difficulties or about to go under. By December two people well known to Varga had left Own3D and moved to Twitch—Stuart Saw and Jason "Opie" Babo. Around December 14, they called Varga and told him OwnD3 was failing, and invited him to join Twitch. The parties disagree whether Saw and Babo told Varga they were, in fact, already at Twitch (388), or whether, as Varga's contemporaneous email to his brother suggests (Ex. 47) they were "going to Twitch" i.e., had not yet moved. It doesn't matter. In any event, Saw and Babo were clearly lauding Twitch, and casting aspersions on Own3D; their loyalties had overtly switched to Twitch. Under the circumstances, which included Babo and Saw making an offer with specific numbers for revenue sharing and other terms, I do not credit Varga's testimony when he said he

[2] This is the limitations of liability at § 8.4. The term "the agreement" begs the issue of which of two agreements—the original 2012 agreement and the 2014 renewal—is at stake. The terms are the same, but the circumstances of the signing are not quite the same. I distinguish between the agreements as needed.

[3] Parenthetical numbers refer to the pages of the trial transcript.

"had no idea then" that Saw and Babo were "speaking to you on behalf of Twitch" if what he meant was he did not think they were presenting an offer from Twitch (137). Saw and Babo told Varga that Own3D was in effect coming apart (56, 67, 69, 73-74, 155) and offered him a contract with Twitch. I infer that Varga thought, accurately, that Saw and Babo were authorized to make him the offer, because Varga testified that he accepted their offer "then and there" (67, 81, 167, see 78 (agreed to join Twitch when call was done)). Whether he did, in legal fact, then accept the deal is a distinct matter; for now the point is simply that Varga must have thought Saw and Babo were agents for Twitch.

On the call of November 14, 2012, Saw and Babo offered to have Twitch pay the almost $8000 Varga was owed by Own3D, a percentage of the advertising revenue stream, a certain sum per number of visitor to the Varga's streams, and other terms. The parties disagree on whether Varga in fact negotiated the final financial terms: Twitch says Varga negotiated and got better terms than originally offered (391-382; 456-57) and Varga says he was presented with those terms (76). After the call, Varga sent his brother an email on the deal (Ex 47), asking him "Tell me what you think".

Two days later, Varga got the written agreement from Twitch. During that interim period, Varga considered what to tell his fans and other issues related to the move (159-60), including "doing me [sic: my] research" Ex. 46 (92); and while he says he felt pressured to sign, it was Varga who called Twitch (by contacting Twitch's John Howell) to find out where the contract was. Ex 48. (162)

As an aside on this issue of being 'pressured' to make the deal, which relates to Varga's unconscionability argument, I distinguish a felt pressure to agree with Babo and Saw on the phone, which is only marginally relevant, from pressure to sign the contract, which is centrally

relevant. It is clear that no party thinks a binding deal was reached on the November14 phone call. The binding deal is the signed agreement. And there was no time pressure exerted on Varga in connection with that. No one at Twitch told him he had to sign quickly, or by any particular date, for example.

Turning back to our chronology: two days after his call with Babo and Saw, Varga on November 16 was in contact with Twitch's John Howell, asking for the agreement. (162) Later that day, Howell sent him the agreement via the HelloSign site. Ex 50. As the last page of Ex 50 records, it was provided to Varga at 3.35 UMT (which is Greenwich mean time, usually 7 hours ahead of West Coast time[4]). Varga viewed it a minute later, and again 6 minutes later, and later signed it 33 minutes after it was sent to him. The agreement is about 16 pages, with two sections in all capital letters: the disclaimer of § 7.4 and the limitations of liability section at issue now, § 8.4. The HelloSign site presented the agreement with the signature page first; one may scroll down to see the rest of the pages. (303, 401-02) Varga did not scroll. He isn't sure what he was doing during the time he first accessed the agreement to the time he signed it- perhaps playing a videogame (164-165). He could have reviewed the agreement, but did not (id.).

The agreement's term was two years, i.e., it would expire November 2014. Many months before that on April 2, 2014, Varga was sent via HelloSign an amendment (Ex 51), a two-page document which in effect extended the agreement for another two years. No one was in a rush to get this done—it was, after all, more than half a year before the agreement was to expire. (323)[5] Varga eventually got around to signing it April 24, and during that time period discussed the agreement with no one at Twitch (178) and did not review the agreement itself. (Although Twitch did not enclose a copy of the original agreement with the amendment, it was always

[4] https://www.timeanddate.com/worldclock/timezone/utc

[5] Twitch did want to get the matter settled before the last minute (e.g., 411).

available to Varga: indeed, he retrieved it to produce in this litigation (163).) Varga signed the agreement within a minute of opening the document (181).

The HelloSign mechanism was the same in 2012 as it was 2014. (181) One may scroll through agreements on this site. (401-402) Varga vaguely suggests that he didn't know he could scroll through the agreement:

> And does it -- are you testifying that -- does it prevent you from scrolling backward or forward in the agreement?
> A. I don't know if it prevents you. I think if you hit the scroll wheel, it might work, but there was a big button for me to "sign here," "continue," and that's what's like in different colors. So I clicked that as thinking that's what I had to do.
> Q. So you just had to do that? You couldn't scroll around and take a look at the agreement?
> A. Again, I didn't know if that's what needed to be done.
> (182; see also 184-85)

I find the suggestion, if that what it is, incredible. Varga, who spent virtually all his waking hours on computers, and was familiar with a variety of programs,[6] knew he could scroll through the agreement. He had the time, both in 2012 and 2014, to do so, and if he had he would have seen § 8.4. He simply chose not to do so.

Unconscionability

> The overarching unconscionability question is whether an agreement is imposed in such an unfair fashion and so unfairly one-sided that it should not be enforced.
> -*OTO, L.L.C. v. Kho,* 8 Cal.5th 111, WL 4065524, at *5 (2019)

As our Supreme Court has recently reminded us, unconscionability has two aspects: a procedural element which looks to the "circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power," and substantive unconscionability which "pertains to the fairness of an agreement's actual terms and to

[6] Some of those programs are shown on Ex 46, some of which have scroll bars; see also the many programs Varga worked with (129-130); and his work history (34-35).

assessments of whether they are overly harsh or one-sided." *OTO* at *6. See also e.g., *Subcontracting Concepts (CT), LLC v. De Melo*, 34 Cal. App. 5th 201, 208 (2019). We are to balance this aspects: if there is less evidence of one, then there must more of the other in order to find unconscionability. *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US),* LLC, 55 Cal. 4th 223, 247 (2012).

Varga has the burden of establishing unconscionability. *Pinnacle Museum*, 55 Cal. 4th at 247.

A. Procedural

Oppression

An initial inquiry is whether Varga was presented with a 'take it or leave it' contract, a contract of adhesion in the context of an imbalance of power. *OTO* at *6; *Subcontracting Concepts,* 34 Cal. App. 5th at 210. Employment agreements are typically contracts of adhesion, but the agreements in this case were not employment agreements. Whether the contracts were presented on a 'take it or leave basis' is fact specific here: Varga says he didn't know he could negotiate; and Twitch says he could have done so (287); and indeed, did so (456-57).

Adhesion is also a function of the degree to which Varga had a meaningful choice. In 2012, Varga could have continued with Own3D: to be sure, he was told by Saw and Babo that Own3D was on its way out, but that was not clear at the time. Some thought Own3d would survive, others didn't. (36) There were alternatives at the time, mentioned in Twitch's Closing Brief at e.g., 10, but none compared to either Own3D or Twitch,[7] and I find they were not practical alternatives for Varga.

[7] (125-127-problems with putative 'competitors'). By 2014, there were probably no good alternatives to Twitch (e.g.,176-77, 191).

On balance, because (i) it's clear that Babo was, on the basis of a relationship of many years, fully trusted by Varga,[8] (ii) Babo and Saw on their November 2012 call went quite out of their way to induce Varga to believe that Own3D was doomed; and (iii) as upper level employees at Own3D (as they had been), Saw and Babo would have appeared to Varga to be in a position to know Own3D's prospects, I find that Varga reasonably thought that he would have to sign with Twitch, but only at some point in the foreseeable future, and not necessarily at the very moment he signed the agreement. Twitch could have survived without Varga: Varga reasonably could have concluded, and probably did as a result of his call with Saw and Babo, that he could not thrive for long without Twitch. This weighs in favor of a finding of oppression.

Also relevant to the issue of relative bargaining power was the extent to which Varga was popular, in turn a sign of how economically attractive he was to Twitch, and so a measure of the extent to which he could have leverage in bargaining. It isn't entirely clear how relevant this inquiry is because while Varga was aware of his standing, the number of fans he had, and the like, he didn't seem to understand either in 2012 or in 2014 the fact that his status could be used to negotiate favorable terms with Twitch. In addition, the bargaining power that he did have in in both 2012 and in 2014, even though it was not consciously used by Varga to secure good financial terms,[9] did in in fact result in him getting what apparently were the best terms available (370 (70/30 terms); 391; 322 (best terms in 2014)).

I note that in 2012 Varga was rising through the ranks (50) and near the top for the game he specialized in (57); Twitch knew he was then "very successful and prominent" (290; see also 291; 295). By 2014, when he was presented with the amended agreement, Varga's career had taken off (104-05) and indeed he was the number 1 streamer (105, 171, 180-81), at the height of

[8] Varga and Babo went back a long way. Varga repeatedly testified he trusted Babo and thought of him almost like a father. (e.g., 40, 51, 52 (father), 77, 107, 103, 472).

[9] Varga says he didn't try to negotiate. (60)

his career (12). Twitch knew he was "big" and profitable (267-68; 274-75; see also 411-12 (one of the "leading lights in this space"); 403-04).

The adhesion issue is made difficult for two reasons. First, while Twitch tells me all the terms were subject to negotiation (287) Twitch didn't present any contracts with other streamers, much less any with differing terms, even though it was within their power to do so. CACI 203. Second, as I have just noted, even though he knew he was a sought after player in 2012, and in 2014 knew he was at or near the top of his profession, Varga says he did not seek to negotiate; and indeed Varga was so uninterested in the terms of his contracts—both the 2012 and 2014 versions—that he never read them until this litigation (193); indeed, he didn't even look at the financial terms (170). It appears that even had he tried to negotiate at least the financial terms, he would not have made much progress because he got the best deal there was in 2014. (322) I conclude under these unusual circumstances, where (i) a party had bargaining leverage he did not understand, (ii) even if the leverage was exercised, it likely would have made no difference to the financial terms and very likely would have made no difference to terms such as the limitations of liability clause at issue now, and (iii) the party (Varga) was under the reasonable impression that he Twitch as his only choice, the contract was in effect one of adhesion.

This suggests some procedural unconscionability.

As to oppression, we also look to (i) the amount of time the party is given to consider the proposed contract; (ii) the amount and type of pressure exerted on the party to sign the proposed contract; (iii) the length of the proposed contract and the length and complexity of the challenged provision; (iv) the education and experience of the party; and (v) whether the party's review of the proposed contract was aided by an attorney. *OTO* at *7.

In brief, Varga had plenty of time to review the agreement; the agreement is of moderate length, and Varga has not suggested the provision at issue was too complicated to understand. Compare *Subcontracting Concepts*, 34 Cal. App. 5th at 210 (party asked to sign agreement 'on the spot'). Varga had some college education, had been in contractual relationships before, such as with Own3D and others (347); but as I note below there was a significant disparity in legal sophistication, and Varga did not use an attorney.

These factors on balance suggest some oppression.

Finally, the parties had a significant difference in their legal sophistication. Varga in 2014 was 26 years old living with his parents, and he had little to no legal experience. (106-07). Twitch had retained Wilson Sonsini to draft its form agreements including the one at stake now. (208-09, 233-34). This tends towards a finding of oppression. E.g., *De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966, 983 (2018) ("parties' sophistication").

Surprise

The next issue to consider is 'surprise,' i.e. where the allegedly unconscionable provision is hidden within a prolix printed form. *Pinnacle*, 55 Cal.4th at 247; *OTO* at *6. This quality is not a function of the length of the agreement (although that can be relevant and is closely related to its plain English meaning[10]); rather it pertains to the context of the provision at issue, i.e., where the format and wording of the surrounding text aides in hiding the provision. So in *OTO*, the form was "prolix" because it was "written in an extremely small font. The single dense paragraph covering arbitration requires 51 lines. As the Court of Appeal noted, the text is 'visually impenetrable' and 'challenge[s] the limits of legibility.'" *OTO* at *7.

[10] https://www.merriam-webster.com/dictionary/prolix; https://dictionary.cambridge.org/us/dictionary/english/prolix ("using too many words and therefore boring or difficult to read"). The prolix form in *OTO* was 1 page.

There is something odd about Varga's argument that there was "surprise" when Varga never even attempted to review the agreement, and indeed to the time of trial never had. (181, 193, 162) The agreement (Ex 31) is about 16 pages, the font is small, but the capitalized wording of § 8.4 is noticeable even on a quick scan of the pages one might do to simply get a sense of the overall content or structure of the agreement. The language of the agreement is in some places probably obscure to a layperson, such as at § 1.1.3 (restrictions), § 8.3 (conditions to indemnity) and some provisions need at least a few readings to get the rough meaning (e.g. § 6 on confidentiality), but Varga does not actually argue that any particular language is impenetrable or illegible; he still has not read the agreement and he did not (and could not) testify that any language was particularly obscure to him. Rather, Varga argues that § 8.4 is 'hidden' because it is just past the middle of the agreement. But of course, *some* language *must* be in the middle of *any* agreement. There is either no, or extremely low level of, surprise here.

Reviewing both oppression and surprise, there is some procedural unconscionability, based on the oppression factor.

B. Substantive

"Substantive unconscionability addresses the fairness of the term in dispute. [It] 'traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." [Citations]. *Subcontracting Concepts*, 34 Cal. App. 5th at 212, quoting *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1248 (2011). Varga argues there are three "one–sided" provisions here: Varga cannot recoup money owned to him over $50,000, even if he proves the loss; confidentiality and indemnification exclusions benefit Twitch but not Varga; and the definitions of gross revenues "protect Twitch's interest at Varga's expense." Plaintiff Closing Brief at 17.

As to the first issue, Varga is correct. Twitch promised to pay money to Varga: were Twitch fail to do so, Varga would be unable to collect more than the $50,000 limit. Varga's monthly income averaged over $5000 per month and appeared to cluster around $10,000 per month (Ex. 30), so the $50,000 cap is so incommensurate as to be unconscionable.[11]

Twitch's response is that this is a "hypothetical" issue that does not affect this litigation. Twitch's Closing Brief at 18. (Twitch argues this in connection with all three provisions discussed in this section.) I discuss that issue separately below.

As to the second issue, it is true that the provisions conceivably might benefit Twitch more than Varga, but the result is reasonable. In fact, there was no substantial evidence that Twitch gave Varga confidential information, or that the parties contemplated it might do so. (406) If Twitch did, it was the compensation packages which were disclosed in this case. (255) Varga likely gave Twitch some confidential information on his bank account in order to enable payment. (406-07) As to indemnification, the protections correspond to the services and products which each side brings to the table: Varga indemnifies for legal problems with the content he creates, and Twitch indemnifies for the legal problems—essentially intellectual property issues—which its software and site might create. A reason for one-sidedness cuts against a finding of substantive unconscionability. *West v. Henderson,* 227 Cal. App. 3d 1578, 1588 (1991), overruled on separate issue *by Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assn.*, 55 Cal. 4th 1169 (2013).

[11] In a different context concerning liquidated damages, Twitch makes the point that foreseeable damages ought to be determined as of the time of the agreement. Twitch Closing Brief at 25. I expect Twitch would make the same argument here, especially in light of my discussions under the topic "Hypothetical unconscionability" focusing on that time to determine unconscionability. It's true that Varga was making less before he signed with Twitch, but his trajectory was clearly on the upward swing, he was a top streamer, and from those facts and the eagerness with which he was sought by Twitch, I infer both Varga and Twitch understood his earnings would rise substantially after he came over to Twitch. As of 2014 it was entirely clear that Varga's earning were as stated in the text.

As to the third issue, Varga notes that 'gross revenue' does not include fraudulent payments and charge-backs. See agreement (Ex 31) at its Ex. B, §§ 1.1.1, 1.3.1. So instead of suing Varga for the return of sums it paid attributable to that fraudulent gross revenue, Twitch might be able to set off those sums against Varga's future's earnings. Plaintiff's Closing Brief at 19. Perhaps. But it is not unreasonable to define gross revenues as the Agreement does, to cover the revenues that Twitch, in the end, actually ends up with.

C. Hypothetical unconscionability

As to all three issues discussed just above, Twitch argues that the claimed substantively unconscionable consequences are not involved in this case, and hence should not figure in my determination. Twitch cites three cases: *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 622 (1996); *West v. Henderson*, 227 Cal. App. 3d 1578, 1588 (1991), overruled on separate issue by *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assn.*, 55 Cal. 4th 1169 (2013); *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145, 1156 (N.D. Cal. 2013), *aff'd*, 601 F. App'x 461 (9th Cir. 2014). Twitch Closing Brief at 18. None of these cases quite supports Twitch's argument.

Olsen's statement is at best dicta. The court discussed contracts skiers were expected to sign releasing ski rental companies from liability. By the time the court reached unconscionability, it had already decided the releases at stake there were reasonable, and then went into this dicta:

> This is not to say that under appropriate circumstances we would not find a broadly or vaguely worded release unconscionable. However, such a determination must await those circumstances. Courts do not render advisory opinions. Courts deal with actual, not hypothetical, controversies. All we conclude here is that it is not unconscionable for ski equipment distributors and retailers to require and use the releases at issue as a condition for doing business with them.

48 Cal. App. 4th at 622. It is not clear what the court means here; but in context it seems as if it might refer to a situation where a skier was "surprised" by the release, contrary to the court's view that skiers would generally not be surprised at all.

West is not more helpful. There, the court didn't quite hold that a hypothetical unconscionability should not be considered, rather, it held that if an unconscionable result were to occur, a trial court could deal with it by severing out the offending provision:

> To support her position the limitation on actions was unconscionable, West presents a hypothetical situation. Under the limitation of actions provision, the lessor could bring an action after the six-month period had run and be immune to any defense raised by the lessee. While this possible liability without defenses seems unjustifiably inequitable, we reject this hypothetical observation as a reason to find the provision substantively unconscionable. Civil Code section 1670.5 gives a court power to refuse to enforce an offending clause. Thus, if a lessor were to bring an action against a lessee and assert this provision as a bar to any defense on the part of the lessee, a court could refuse to enforce it. The limitation of defenses is irrelevant to this case because it is not being asserted against West and could be subject to unconscionability review separately.

West, 227 Cal. App. 3d at 1588.

Zaborowski doesn't seem to be on point at all. It faced two alternative readings of a contract and decided to follow the most reasonable one. *Zaborowski*, 936 F. Supp. 2d at 1156.

On the other hand we have this, directly on point, from our court of appeal:

> As a preliminary matter, appellants argue that certain provisions in the arbitration clause, including the bar to recovery of attorney fees and the Private Attorneys General Act (PAGA) waiver, cannot be found unconscionable because respondent has not attempted to pursue those claims or remedies in his administrative wage claim. The question in determining unconscionability, however, does not involve comparing the terms of the arbitration clause with the non-arbitration claims respondent is pursuing. Rather, under Civil Code section 1670.5, subdivision (a), we review the arbitration clause for substantive unconscionability at the time the agreement was made. (See *Sonic II*, *supra*, 57 Cal.4th at p. 1134, 163 Cal.Rptr.3d 269, 311 P.3d 184 [" 'In determining unconscionability, our inquiry is into whether a contract provision was "unconscionable at the time it was made" ' "].)

Subcontracting Concepts, 34 Cal. App. 5th at 212. As both *Subcontracting Concepts* and *Sonic-Calabasas* observe, the governing statute has just this language. *Sonic-Calabasas A, Inc. v.*

Moreno, 57 Cal.4th 1109, 1133–1134 (2013), citing C.C. § 1670.5 ("at the time it was made"). Cases routinely find unconscionability regardless of a showing that the unconscionable consequence has or has not actually occurred, or is inevitable. For example, in any given case, it might be that little to no discovery is needed, or that punitive damages aren't sought or would not be available anyway, but nevertheless restrictions on discovery and punitive damages are indicia of substantive unconscionability. *Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal.4th 83, 117 (2000).

A proper approach to "hypothetical unconscionability" is hinted at in *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899 (2015), which is that a court may evaluate the reasonable likelihood of a procedural posture, and measure unconscionability from that vantage, regardless of whether the specific case before the court actually involves such a posture. The issue is: what are the *likely risks* borne by the parties—as of the time of contracting:

> We agree with Valencia that the appeal threshold provision does not, on its face, obviously favor the drafting party. Assuming, as the parties do, *the likely scenario* of the buyer as plaintiff and the seller as defendant, the unavailability of an appeal from an award that is greater than $0 but not greater than $100,000 means that the buyer may not appeal from a non-$0 award that he or she believes to be too small, nor may the seller appeal from a quite substantial award (up to $100,000) that it believes to be too big. It may be reasonable to assume that the ability to appeal a $0 award will favor the buyer, while the ability to appeal a $100,000 or greater award will favor the seller. But nothing in the record indicates that the latter provision is *substantially more likely to* be invoked than the former. We cannot say that the risks imposed on the parties are one-sided, much less unreasonably so.

Sanchez, 61 Cal.4th at 916–917 (emphasis supplied). See also e.g., the reasoning in *Carbajal v. CWPSC, Inc.,* 245 Cal.App.4th 227, 248 (2016) (discussing unreasonable distinctions in treatment of "claims [employee] is mostly likely to bring, [versus those] the employer … is most likely to bring"); *Baltazar v. Forever 21, Inc.*, 62 Cal.4th 1237, 1247 (2016) ("we are willing to accept for the sake of argument that employers are, in general, more likely than employees to

seek provisional relief"). For these reasons I reject Twitch's hypothetical unconscionability argument.[12]

D. Conclusion on unconscionability

There is a low level of procedural unconscionability and a high level of substantive unconscionability, in that the $50,000 cap is overly harsh and unreasonably and unfairly one-sided. *Sonic–Calabasas, 57* Cal.4th at 1146. There is no reason to limit Varga to $50,000 when he might well be entitled to a much, much higher sum.[13] *Armendariz,* 24 Cal.4th at 117-188 (unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it).[14]

From a practical point of view, which I think is an essential consideration,[15] limiting recovery to $50,000 virtually kills off the odds of a suit against Twitch at all. The agreement doesn't appear to have an attorney fees clause, and few—if any—lawyers would take on a contingency case against Twitch for some reasonable percentage of $50,000.[16]

The cap is unconscionable.

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[12] It is true that unconscionability issues may not be resolvable, as Twitch could be seen to argue, in the abstract, *OTO*, 2019 WL 4065524, at *9 (close "question, which cannot be resolved in the abstract"). But implying that one needs a concrete context means unconscionability must be measured against the remedies otherwise available to the parties, *id.;* it doesn't mean unconscionability is measured at some point other than at the time of signing.

[13] Ex 30 (payment Schedule) shows $572,781.11 in payments, including payments per month of $17,573, $20,597, $15,720, $26,690, $18,592, $55,944, etc.

[14] Twitch does not offer a justification in this context. It does suggest a business rationale for something else, i.e., for the indemnification and confidentiality provisions of the agreement. Twitch Closing Brief at 20.

[15] Practicalities matter. E.g., *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1072, 1091 (2003) (quoiting authority, "As a practical matter"); *Arguelles-Romero v. Superior Court*, 184 Cal.App.4th 825, 841–842 (2010); *Armendariz*, 24 Cal.4th at 108 ("the very practical reason").

[16] The parties have not addressed a potential ambiguity in the wording of § 8.4 of the agreement. The use of the phrase "an aggregate amount" in the its last line suggests a reading that total liability under the contract—say, liability established in multiple lawsuits—cannot exceed the $50,000 limit (as opposed to limit that applies once per suit).

Public Policy

The complaint has causes of action for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, negligent misrepresentation, and a violation of B&P § 17200. The issue here is the application of C.C. § 1668. This section bars limiting liability for "fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent". The parties agree on some of the issues.

Twitch agrees the limitation of liability clause does not apply to intentional misrepresentation, nor to negligent misrepresentation. Twitch argues it applies otherwise. Twitch Closing Brief at 22. Varga argues his claims for breach of contract, breach of the covenant of good faith and fair dealing are also covered by § 1668.

Twitch's argument. Section 1668 plainly covers the statutory claim here, B&P § 17200. Twitch's counterargument is that because § 17200 must have predicates, and because the predicates include the breach of contract claims, and those aren't covered by § 1668, neither is the § 17200 claim. But § 17200 damages aren't contract damages; only restitution is available. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003). Section 1668 tells us those statutory damages can't be elided by contract. I reject Twitch's argument on B&P § 17200.

Varga' Argument. Despite the wording of § 1668. Varga argues that his two contract-based claims are covered.

As Twitch correctly notes, tort liability and damages and contract liability and damages are separate. Cases typically hold claims for misrepresentation are subject to § 1668 but that contract claims are not. E.g., *RSB Vineyards, LLC v. Orsi*, 15 Cal.App.5th 1089, 1104 (2017). Varga cites a case in support of the notion that if the breach is intentional, then § 1668 applies and liability for the *breach* may not be disclaimed. *Civic Center Drive Apartments Ltd.*

Partnership v. Southwestern Bell Video Services, 295 F.Supp.2d 1091, 1106 (N.D. Cal. 2003) ("§ 1668, which does not expressly limit the rule to tort claims"). As Varga would have it, the exceptions would swallow the rule, because many if not most breaches of contract are intentional.

In any event, Magistrate Judge Spero's opinion in *Civic Center* is distinguishable: There, as Judge Selna later noted, "damages resulted from the defendant's fraudulent concealment of its faulty performance," not the performance itself. *United Stateas [sic], for the Use of Integrated Energy, LLC v. Siemens Government Technologies, Inc.* (C.D. Cal., May 19, 2017, No. SACV1501534JVSDFMX) 2017 WL 10562969, at *5. That is, the damages do not result from the breach of the contract as such. See also e.g., *Darnaa, LLC v. Google Inc.* (N.D. Cal., May 16, 2017, No. C 15-03221 WHA) 2017 WL 2118301, at *3:

> *Civic Center* involved allegations that the defendant fraudulently concealed its failure to perform its duties under the contract (not merely *that* it failed to adequately perform) … Here [by contrast], Darnaa's damages, if any, stemmed purely from defendants' performance under the contract….

The contract claims here, as described by Varga, are even more removed, in that whatever fraud there might have been was not fraudulent concealment, but rather were assertedly false *reasons* Twitch gave for its breach of contract. Presumably Varga agrees he can win his contract claims whether he proves Twitch made up reasons for its breaching action or not; i.e. the reasons are immaterial to the claims. Accordingly, Varga is not correct that the breach of contract claims are covered by § 1668.

Conclusion regarding § 1668

Under C.C. § 1668, the limitations of liability clause in the agreement does not affect these claims: intentional misrepresentation, negligent misrepresentation, and B&P § 17200.

Liquidated Damages Clause

> Both sides agree on the basic formulation of the notion of liquidated damages
>
> to indicate an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement, and which may not ordinarily be modified or altered when damages actually result from nonperformance of the contract.

McGuire v. More-Gas Investments, LLC, 220 Cal. App. 4th 512, 521 (2013) (quotation omitted).

But the parties disagree whether the limitations of liability provision here liquidates damages. It is certainly not phrased as such a provision: it is phrased as a *limitation* on liability, and plainly allows for any amount of damages up to the limit. Thus it doesn't "fix" damages. I also note the general policy behind the bar on unreasonable liquidated damages provisions, which is that they act as an unreasonable "penalty or forfeiture," i.e., causing defendants to pay far more than they should. *Purcell v. Schweitzer,* 224 Cal. App. 4th 969, 975 (2014). That is not the issue here, where Varga alleges the provisions unreasonably reduces his entitlement, and Twitch remains free to press for damages below $50,000.

Varga cites two cases. The first is *H. S. Perlin Co. v. Morse Signal Devices*, 209 Cal. App. 3d 1289, 1292 (1989). Varga's cite is misleading. In that case the parties did not disagree on whether the provision there was a liquidated damages clause, probably because the contract expressly said it *was* such a clause.[17] So the court didn't address the issue. Varga's next case is *Apex Compounding Pharmacy, LLC v. eFax Corp.,* No. LACV1605165JAKJPRX, 2018 WL 2589096 (C.D. Cal. Apr. 26, 2018). Varga tells me that the clause there, said to be very similar to that in the present case, was found to be a liquidated damages clause. Varga Closing Brief at

[17] The contract read in part, "it is impractical and extremely difficult to fix the actual damages, if any, which may proximately result from the failure on the part of Morse to perform any of its obligations hereunder, or the failure of the system to properly operate with the resulting loss to the Subscriber. If Morse should be found liable for loss or damage due to a failure on the part of Morse or its system, in any respect, its liability shall be limited to the refund to Subscriber of an amount equal to the aggregate of six (6) monthly payments, or to the sum of Two Hundred Fifty ($250.00) Dollars, whichever sum shall be less, as liquidated damages…" *H. S. Perlin,* 209 Cal. App. 3d at 1292.

23. But *Apex* is odd, because *both* sides argued the language there was *not* a liquidated damage provision. *Apex*, 2018 WL 2589096, at *11. The court offers no reason why it decided to consider liquidated damages, and it provides no analysis of why it decided the provision was a liquated damages clause, other than to note the language that damages were "limited to $50." *Apex,* 2018 WL 2589096, at *10. Perhaps the court thought that this actually meant all damages were fixed at $50, with "limited" treated as a synonym for "fixed;" or perhaps it thought that because the monthly fees there in issue ranged between "$150 and $400," *id.* at *4, the $50 figure acted as both a lower and upper limit, *in effect* a "fixed" sum. Or it may be that *Apex* assumed this was a liquidated damages clause for purposes of discussion—which was resolved by finding the limitation reasonable in any event. I do not find *Apex* useful. No court has cited *Apex*, and Varga has no other authority on this matter.

Accordingly, I do not treat the limitations of liability clause here as a liquidated damages clause.

Conclusion

The $50,000 cap in the limitations of liability clause is unconscionable. Independently, it is does not (under C.C. § 1668) affect claims for intentional misrepresentation, negligent misrepresentation, and B&P § 17200.

My final statement of decision will set a case management conference to discuss next steps in the case.

Dated: September 27, 2019

Curtis E.A. Karnow
Judge Of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On SEP 27 2019 , I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: SEP 27 2019

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk